

SEP 29 1983

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ALEXANDER L STEVAS,
CLERK

JOHN DOE,

Petitioner,

v.

UNITED STATES OF AMERICA,
*Respondent.***In re: Antitrust Grand Jury Investigation****PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

WILLIAM W. TAYLOR, III *
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QUESTION PRESENTED

Whether a district court is foreclosed from quashing a subpoena issued for an improper purpose if the prosecutor also had a legitimate purpose.

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IN THE
Supreme Court of the United States
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No. _____

JOHN DOE,
v.
Petitioner,

UNITED STATES OF AMERICA,
Respondent.

In re: Antitrust Grand Jury Investigation

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 31, 1983, reversing an order of the United States District Court for the Eastern District of Virginia.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is not yet reported. The opinion appears as an appendix to this petition.¹

¹ To preserve the secrecy of the grand jury proceedings, the Court of Appeals captioned its opinion *United States of America v. (Under Seal), In re: Antitrust Grand Jury Investigation*.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).²

STATEMENT

In November, 1981, petitioner was subpoenaed to appear before a grand jury investigating bid rigging in the road building industry in Virginia, where petitioner is a principal in a small, family-owned construction company. His brother and cousin are the other principals. All three, as well as the company, had been identified by prosecutors as "targets" of the investigation. At no time, however, has the government had sufficient information to justify a recommendation that petitioner, any of his close family members, or the corporation be indicted. Pet. App. 3a.

When the Government was advised that the petitioner would refuse to testify on the basis of his privilege against self-incrimination, the government authorized an application to compel his testimony under a grant of immunity pursuant to 18 U.S.C. § 6002. Petitioner then brought to the government's attention its own policy, embodied in the U.S. Attorney's Manual, *see* United States Attorney's Manual ¶ 11.214, that prohibits compelling a witness to testify against a close family member except in "exceptional circumstances." Petitioner represented to the government that ignoring its own policy would cause his family "immeasurable suffering" and "place him in an impossible conflict with his religious and moral convictions." Pet. App. 2a.

Having thus neglected Department of Justice policy, Tr. 246, the government agreed not to require petitioner

² The District Court made findings of fact and conclusions of law which it directed be filed under seal. Petitioner has lodged one sealed copy of the transcript of the District Court findings with the Clerk of this Court. References to the transcript are indicated as Tr. ---.

to testify, and the prosecutor in charge of the investigation was directed to pursue other means to obtain information. The prosecutor never sought in good faith to explore these other means. Tr. 247, 254. Instead, in October, 1982, he returned to what the District Court characterized as "his first love"—seeking the petitioner's immunized testimony. Tr. 247. Accordingly, on October 15, 1982, a new grand jury subpoena was issued and new proceedings were initiated to authorize a request for immunity.

In pursuing petitioner for the second time, two critical facts were evident to the prosecutor: first, that the petitioner was "likely to commit contempt rather than obey the Court's order," Tr. 243,³ and, second, that the coercive effect of the order to testify would be so substantial, in light of petitioner's close family ties and strongly held convictions, that other members of his family might be compelled to plead guilty rather than allow petitioner to be imprisoned for contempt. Tr. 248. The District Court graphically described the state of mind of the prosecutor in seeking a second immunity order for petitioner:

Let's make [petitioner] talk. If [petitioner] won't talk, well, we'll put him in jail. It's coming on to Christmastime and if what [petitioner's counsel] said about that family is true, the very thought of having [petitioner] in jail during Christmastime will be magic. We will get our plea bargain.

Tr. 247.

Further attempts to encourage the government to honor its own policy against compelling family members to testify against each other were thwarted by the prosecutor in charge of the investigation, who devised an interpretation of the policy that the District Court found to be

³ The District Court expressly found the government's claim to have reached a contrary decision regarding the likelihood of the petitioner to testify rather than stand in contempt to be "suspect" and "a suspicious circumstance." Tr. 243.

"bizarre, strained, not serving any substantial purpose . . . and contrary to the substantial purpose served by the policy as written." Tr. 244.⁴ When counsel for the company sought to intervene, the government attorney not only recognized the likely coercive effects of an order to testify, but sought "right flat-out," Tr. 248, to exploit them in plea negotiations. The District Court found that the prosecutor proposed in substance:

I'll make a deal with you. I'll keep [petitioner] from having to testify against his brother if [the petitioner] or [his brother] or [his cousin] or one of them, I don't care who, pleads guilty to something, and I will decide later what it is they have to plead guilty to. They might have to spend some time in jail, and if that's the price you are willing to pay to keep from having to testify before the Grand Jury, you have met your man, because I'll agree to it.

Tr. 248.

The coercive potential of the subpoena was not simply a collateral effect forced by circumstances upon the government in its good faith efforts to seek information relevant to the grand jury's mandate. Indeed, the District Court characterized such a view of the facts as "hogwash." Tr. 249. Instead, the Court found that the use of the threat of petitioner's compelled testimony to extort a guilty plea from other close family members was "the heart of all that [the government has] been doing." Tr. 248-49. Characterizing the prosecutor as the "spider who spun the web," Tr. 250, the Court found that the government in fact "initiated" the circumstances it later sought to exploit in plea negotiations. Tr. 249.

The offer to accept guilty pleas from some family members to some offense was not accepted. When the govern-

⁴ The District Court found further bad faith in the prosecutor's failure to disclose to the Court that he had authored for the specific purposes of this litigation what was represented to the Court as a general interpretation of the policy. Tr. 249.

ment's formal application for immunity was granted, the petitioner moved to quash the subpoena. Following an evidentiary hearing, the District Court granted the motion. Although the District Court found that the government had reason to believe that the petitioner had relevant and material evidence to present to the grand jury, it found that the subpoena in fact constituted an effort "to coerce a plea bargain through the *device* of calling [petitioner] to testify under a grant of immunity." Tr. 254 (emphasis added). Concluding that the government's conduct "violates our concepts of ordered justice," Tr. 250, the District Court granted petitioner's motion.

On appeal, a panel of the Court of Appeals for the Fourth Circuit reversed. The Court declined to delve into the improper conduct by the prosecutor found by the District Court. Pet. App. 5a. Rather, relying on the District Court's findings that there was reason to believe that the corporation and its principals were involved in bid rigging and that petitioner possessed relevant information, the Court of Appeals inferred that the government was motivated, at least in part, by a legitimate purpose. The existence of any legitimate purpose, the Court held, "is reason enough not to quash the subpoena." *Id.* The Court of Appeals noted further that because Rule 11(d), Fed. R. Crim. P., requires an inquiry into the voluntariness of a guilty plea, the Rule 11 procedures or collateral relief pursuant to 28 U.S.C. § 2255 provide alternative remedies to prevent the abuse found by the District Court here. Pet. App. 8a-9a.⁵

⁵ On August 31, the Court of Appeals denied petitioner's request for a stay of the mandate. The grand jury then issued a new subpoena, directing petitioner to appear on September 13. In response to petitioner's request to stay enforcement of the subpoena pending application for a writ of certiorari, the District Court, on September 12, granted the motion to stay until October 1, 1983, to permit further research on its authority to grant the stay. The government sought a writ of mandamus directing the District Court to enforce the subpoena. On September 26, the Court of Appeals granted the

REASON FOR GRANTING THE WRIT

THE FOURTH CIRCUIT'S REFUSAL TO INQUIRE INTO THE PROSECUTOR'S IMPROPER PURPOSE IS INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND UNDERMINES THE COURTS' ABILITY TO SAFEGUARD THE INTEG- RITY OF THE GRAND JURY PROCESS.

The decision of the Fourth Circuit in this case stands for the proposition that a subpoena issued for an improper purpose, however heinous, must be honored so long as the prosecution can point to a legitimate purpose as well.* Applying this doctrine, the Court of Appeals thus expressly refused to consider the "findings of fact with regard to misconduct and bad faith on the part of the government," Pet. App. 4a, findings that showed the prosecutor had willfully sought to coerce a guilty plea from a family member through the device of seeking testimony. This head-in-the-sand approach not only is inconsistent with the decisions of other circuits, but opens the door to systematic abuse of the grand jury process.

application and directed the District Court to dissolve the stay. The Order of the Court of Appeals was reported in an unpublished, per curiam opinion. *See In re: Grand Jury Proceedings, United States of America*, No. 83-1850 (4th Cir. Sept. 26, 1983).

* The Court stated:

Even if we assume that the government sought the subpoena for an improper purpose, the finding that it was also sought for a legitimate purpose is not clearly erroneous. The record fully supports the factual findings that there was reason to believe that there had been bid rigging, that the corporation and its principals were implicated and that the witness had relevant evidence to give to the grand jury. This, we think, is reason enough not to quash the subpoena.

The decision below, in focusing only on the existence of some legitimate purpose, breaks company with every other circuit that has addressed the issue. Until the decision in this case, each court of appeals considering claims about prosecutorial abuse of the grand jury process has permitted district courts to inquire into the improper purpose of the prosecution even when a legitimate purpose exists. The courts thus have held that a grand jury subpoena may be quashed, even in the presence of a proper purpose, if the prosecution's improper purpose is "sole or dominant,"⁷ "sole or dominating,"⁸ "sole or principal,"⁹ or "substantial."¹⁰ However the test is stated, the fact is that each permits the district court to weigh the improper purposes of the prosecution against the legitimate purposes in order to determine whether the improper purposes were "dominant," "dominating," "principal," or "substantial."¹¹

⁷ *In re Grand Jury Proceedings*, 632 F.2d 1033, 1040-41 (3d Cir. 1980); *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 429 U.S. 1062 (1977).

⁸ *United States v. Dardi*, 330 F.2d 316, 336 (2d Cir.), cert. denied, 379 U.S. 845 (1964); *United States v. Zarattini*, 552 F.2d 753, 757 (7th Cir.), cert. denied, 431 U.S. 942 (1977).

⁹ *Beverly v. United States*, 483 F.2d 732, 743 (5th Cir. 1972).

¹⁰ *United States v. Doss*, 545 F.2d 548, 552 (6th Cir. 1977).

¹¹ The Third Circuit has adopted a formal procedure to facilitate the district court's inquiry. In petitions for the enforcement of grand jury subpoenas, prosecutors are required "to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose." *In re Grand Jury Proceedings*, 486 F.2d 85, 93 (3d Cir. 1973) (Schofield I) (emphasis added); *In re Grand Jury Proceedings*, 507 F.2d 963, 965 (3d Cir.), cert. denied, 421 U.S. 1015 (1975) (Schofield II). The district court may require additional proceedings if it questions the sufficiency of the government's affidavit. 507 F.2d at 965.

The position of the Fourth Circuit, by contrast, cuts off inquiry just at the point where it would do the most good. As a practical matter, it should be obvious that a prosecutor can do as much harm under cover of a legitimate purpose as he can by a more naked abuse of grand jury power. While the existence of a proper purpose is obviously an important factor to weigh in the determination whether to quash a subpoena, it does not warrant designation as the *only* factor. As the other courts of appeals have recognized, the need for relevant evidence must instead be weighed against the costs to other rights occasioned by abuse of the grand jury system.¹²

The potential for abuse under the Fourth Circuit standard can hardly be overstated. Since a prosecutor can always be deemed to have a legitimate purpose in seeking relevant information,¹³ the necessary result of the decision below is that prosecutors will be able to use the grand jury subpoena power to serve even the most offensive purposes without fear of correction. Thus, for example, a prosecutor could call before the grand jury a witness, already secretly indicted, for the avowed purpose of obtaining further evidence for trial without the presence of the witness' counsel. Yet that practice, which

¹² Although the Fourth Circuit apparently recognized that other courts engage in such a balancing process, citing a decision of the Court of Appeals for the Third Circuit that a subpoena might be quashed if an improper purpose is the "sole or dominant purpose of seeking the evidence," Pet. App. 8a, it made no effort to strike a balance here. Instead, it gave conclusive weight to the existence of a legitimate purpose, thereby reading the second stage of the inquiry out of existence.

¹³ Indeed, the Fourth Circuit said as much:

What governs the decision of this case is the polestar that a court should not intervene in a grand jury process absent a compelling reason. . . . There is insufficient reason to justify the grant of a motion to quash where, as here, the sought-after testimony is of demonstrated relevancy to the grand jury's investigation.

would apparently be without inhibition in the Fourth Circuit, was described in recent years by the Sixth Circuit as reminiscent of the "English Star Chamber, an institution which helped produce the American revolution." *United States v. Doss, supra*, 545 F.2d at 549.

The findings of the District Court here demonstrate that the perils of prosecutorial abuse are not mere speculation. In this case, the prosecution lacks sufficient evidence to indict petitioner or his relatives. Pet. App. 3a. Although the prosecutor was aware for many months that the side effect of an immunity order directed at the petitioner would be to bring considerable pressure on his close relatives to plead guilty, Tr. 243, 248, the prosecutor doggedly persisted in his efforts to subpoena the petitioner. Faced with the clear statements of petitioner's counsel that petitioner's moral and religious convictions would prevent him from testifying against his family, the prosecutor nevertheless concluded (and reported to his superiors) that petitioner would not refuse to testify, a fact the District Court found to be "suspect" and a "suspicious circumstance." Tr. 243. Directed by his superiors to explore other avenues of information, the prosecutor never undertook a good faith effort to secure information from other sources, returning instead to his "first love": obtaining an order compelling petitioner to testify. Tr. 247, 254. And when faced with the obstacle of the Department of Justice's own policy that prohibits compelling family members to testify against one another except in exceptional circumstances, he devised a "bizarre" interpretation of the policy, Tr. 244, that he then misrepresented to the District Court as a general interpretation by a high Justice official, when he had in fact prepared it personally for this litigation. Tr. 249.

The facts, in short, show a consistent course of conduct designed not to use the grand jury to uncover evidence of wrongdoing, but to employ the grand jury subpoena "to coerce a plea bargain through the device of calling [petitioner] to testify under a grant of immunity." Tr. 254.

Indeed, the prosecutor had so little interest in petitioner's testimony that he was willing, indeed eager, to trade petitioner's subpoena for a guilty plea from petitioner, his brother, or his cousin—"I don't care who"—for an unspecified criminal offense—"I will decide later what it is they have to plead to." Tr. 248. Despite the fact that the District Court found this cynical and distasteful conduct to be "the heart of all that [the government has] been doing," Tr. 248-49, the approach mandated by the Court of Appeals excuses the government's conduct based on the mere fact that petitioner possessed relevant evidence, and allows the prosecutor to exploit the power of the grand jury for ends having nothing to do with its legitimate functions.¹⁴

This result not only condones misconduct and abuse, it invites it. As this Court has noted, the grand jury "has been regarded as a primary security to the innocent against hasty, malicious, and oppressive prosecution," protecting against charges "dictated by an intimidating power or by malice and personal ill will." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). See also *United States v. Calandra*, 414 U.S. 338, 343 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 686 (1977). Yet the use of the grand jury

¹⁴ Although the decision of the Court of Appeals evidences a natural reluctance to engage in a detailed inquiry into prosecutorial motive, this Court has recently stated that this reluctance cannot be exalted at the expense of more important interests. See *United States v. Goodwin*, 102 S. Ct. 2485 (1982). In *Goodwin*, the Fourth Circuit, distressed by the "unseemly task" of probing prosecutorial purpose, substituted an irrebuttable presumption of vindictiveness in certain cases for a factual inquiry into actual circumstances. 102 S. Ct. at 2488. While rejecting the presumption, this Court nevertheless recognized that instances of prosecutorial abuse cannot be ignored. It set the balance between the twin goals of avoiding interference with the prosecutorial function and protecting individual rights from prosecutorial abuse by focusing the attention of the courts where it properly belongs: on objective evidence of prosecutorial abuse. 102 S. Ct. at 2494-95. The Court of Appeals has ignored this teaching here.

process to coerce guilty pleas from persons against whom the government has insufficient evidence to indict turns this purpose on its head. In this case, the grand jury was used not to prevent an unfounded criminal prosecution, but rather to obtain, via a guilty plea, an unfounded conviction. If the dual role of the grand jury is to have any meaning, the courts must have discretion to weigh an improper prosecutorial purpose of this magnitude against the need for possible evidence.¹⁵ They should not be foreclosed from preventing "a use of the grand jury [that] would pervert its constitutional and historic function." *United States v. Doss, supra*, 545 F.2d at 552.

2. The Court of Appeals downplayed the impact of its restriction on the authority of the district court by proposing alternative means by which district courts could address the abuses found here. According to the Court of Appeals, any abuses inherent in the use by the prosecutor of a grand jury subpoena as a device to coerce a guilty plea from a relative of the witness could be cured through review of the proffered guilty plea in a Rule 11 proceeding or through collateral relief under 28 U.S.C. § 2255. Pet. App. 8a-9a. The safeguards relied on by the Court are more apparent than real.

In the first place, the inquiry as to voluntariness in a Rule 11 proceeding is designed to address shortcomings of a constitutional dimension. This Court has expressly reserved decision on the question of whether a plea bargain involving threats or promises of leniency to a third party fatally undermines the voluntariness of a plea. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 n.8 (1978). But there can be no question that the intentional use of the grand jury as a "device" to reach this result is, as the District Court found, a repugnant practice that the court

¹⁵ In this case, the prosecution refused to make a good faith effort to get information by other, less coercive means, or to show that the information possessed by the petitioner was necessary to its investigation. Tr. 247, 254.

supervising the grand jury necessarily must have discretion to remedy.

Furthermore, the procedures contemplated in Rule 11 and 28 U.S.C. § 2255 are particularly ill-suited to addressing the abuses identified by the District Court. This Court has on more than one occasion recognized the possibility that plea proceedings may be undermined by subterfuge. *Bordenkircher v. Hayes, supra*, 434 U.S. at 365; *Blackledge v. Allison*, 431 U.S. 63, 76 (1977). The risk of dissembling is unusually high here. Since a party pleading guilty can successfully protect a close family member only by persuading a court to accept his plea, even a diligent inquiry may not uncover abuse. The court inquiring into the voluntariness of a plea in a Rule 11 proceeding would address only the family member who ultimately elected to enter a guilty plea, not the relative who was initially victimized by the prosecutor's misuse of the grand jury's subpoena. The court might well learn that the plea was induced by promises of leniency to a third party—a fact suspicious in itself¹⁶—but it could only through happenstance be expected to learn that the source of the familial pressure was a subpoena issued with no expectation of obtaining relevant evidence and with the specific intention of coercing a plea from some family member.¹⁷

The prospects for uncovering abuses through collateral relief under 28 U.S.C. § 2255 are no better. A request for relief under this provision necessarily presupposes a Rule 11 hearing at which the district court made express, on the record findings of voluntariness based on testimony by the party pleading guilty. This Court has held clearly that such declarations "carry a strong presumption of

¹⁶ See *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979) and cases cited therein.

¹⁷ The court conducting the Rule 11 proceeding may not necessarily be the same court that supervised the grand jury proceeding.

verity," rendering later claims contradicting in-court statements subject to summary dismissal. *Blackledge v. Allison, supra*, 431 U.S. at 74. While the barrier of a prior Rule 11 proceeding is not "invariably insurmountable," this Court has nevertheless characterized it as "imposing." *Id.*¹⁸ It renders collateral relief a poor and unreliable mechanism for protecting the integrity of the grand jury process.

Finally, the procedures relied upon by the Court of Appeals fall short of remedying the harm generated by prosecutorial misconduct. At most, Rule 11 and 28 U.S.C. § 2255 would prevent or correct a guilty plea made involuntarily. They could do little to remedy the damage to individuals and family ties generated by the improper pressure that ultimately induced the guilty plea. And the cold comfort of relief under 28 U.S.C. § 2255 would be available only after the public obloquy of a guilty plea and, perhaps, the pain and disruption of a prison term.¹⁹

In short, the alternative remedies cited by the Court of Appeals are ineffectual and cannot justify its refusal to permit the district court to inquire into whether the subpoena in this case should be quashed because of the prosecution's improper purpose.

¹⁸ See also *United States v. Deal*, 678 F.2d 1062 (11th Cir. 1982); *United States v. Bambulas*, 571 F.2d 525 (10th Cir. 1978).

¹⁹ As a practical matter, as long as the prosecutor is permitted to threaten contempt against one family member as a device to extort a guilty plea from another, the party pleading guilty would be dissuaded from seeking collateral relief at least until after the grand jury term expired, perhaps as long as 18 months.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1138

UNITED STATES OF AMERICA,
Appellant,
v.

(UNDER SEAL),
Appellee.

IN RE: ANTITRUST GRAND JURY INVESTIGATION

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond
D. Dorch Warriner, District Judge

Argued May 10, 1983

Decided August 10, 1983

Before WINTER, Chief Judge, SPROUSE, Circuit Judge,
and BUTZNER, Senior Circuit Judge.

Neil R. Ellis, Dept. of Justice (William F. Baxter, Assistant Attorney General, Robert B. Nicholson, Dept. of Justice, Peter A. Mullin and James A. Morgulec, Dept. of Justice on brief) for Appellant; William W. Taylor, III (Stephen H. Glickman, Zuckerman, Spaeder, Moore, Taylor & Kolker on brief) for Appellee.

WINTER, Chief Judge:

The district court quashed a grand jury subpoena on the ground that the prosecutor improperly sought to have the witness immunized and to compel him to testify in order to coerce a plea bargain from a relative of the witness. The district court also found that enforcement of the subpoena would aid the grand jury in its investigation.

The government has appealed, and we reverse.

I.

Under the guidance of the Antitrust Division of the Department of Justice, a grand jury was investigating bid rigging in the road building industry in Virginia. Appellee was subpoenaed to appear before the grand jury in November 1981, after the Division was informed that a corporation owned and managed by him, his brother and his cousin had been involved in bid rigging.¹ When the government learned that appellee would refuse to testify on the basis of his privilege against self-incrimination, an Assistant Attorney General of the United States authorized an application to compel his testimony under a grant of immunity as provided in 18 U.S.C. § 6002.

Appellee continued to resist, representing that his testimony against family members would cause them "immeasurable suffering" and "place him in an impossible conflict with his religious and moral convictions." He also claimed that the government was violating the policy of the Department of Justice not to compel the testimony of a witness who is a close family relative of the person whose conduct the grand jury is investigating except in

¹ To preserve to the extent possible the secrecy of the proceedings of an existing grand jury, the parties will not be named and only so much of the facts as are necessary to the decision will be disclosed.

"exceptional circumstances." The upshot of appellee's protest was that the government concluded not to require him to testify at that time, but to pursue other potential sources of information.

In an unrelated proceeding, it was judicially determined that the grand jury conducting the investigation was improperly constituted. A new grand jury was convened in September 1982.

On October 15, 1982, a new grand jury subpoena was issued and new administrative proceedings to authorize a request for immunity were begun.² Appellee again resisted the subpoena and made plain his position that he would refuse to testify even under a grant of immunity. In conference, the government attorney conducting the investigation, told counsel for the corporation that appellee would be excused from testifying if the corporation and one individual who was a relative of appellee would plead guilty to a felony to be selected by the government. There was evidence that, at this time, other potential sources of information had not been pursued, and the government attorney knew that the government lacked evidence to request an indictment of the corporation or appellee's relatives. The government attorney also conceded that he thought that appellee's relative would plead guilty rather than see appellee jailed for contempt. He further admitted that when he sought approval from his superiors to seek immunity for appellee he had advised them that, notwithstanding appellee's consistent position,

² As a result of appellee's counsel's efforts to have the policy of the Department of Justice against requiring adverse familial testimony applied so as to deny permission to seek to immunize appellee, a policy interpretation issued, ruling that the policy applies when the witness gains knowledge of illegal conduct through a familial relationship but not when the knowledge is gained through a business relationship such as a family business. Thus it was concluded that appellee could be compelled to testify as to information acquired in his corporate capacity.

there was no likelihood that appellee would commit contempt rather than to obey a court order to testify.

The offer to accept pleas of guilty in exchange for excusing appellee from testifying was not accepted; and when the government's formal application for immunity was granted,³ appellee moved to quash the subpoena.

After an evidentiary hearing, the district court granted the motion to quash. It found as a matter of fact that the Antitrust Division was engaged in a good faith and laudable investigation, that there was reason to believe that the corporation and its principals had engaged in bid rigging, and that the witness had relevant and material evidence to present to the grand jury. But it also found that one of the government's purposes in seeking the subpoena was to coerce one of the witness's relatives into a plea bargain, because, as the district court further found, no one could have thought that the witness "was not likely to commit contempt rather than obey the Court's order [to testify]." The district court found further misconduct and bad faith on the part of the government, because it had not exhausted other sources before seeking the second subpoena, and because it had devised a "bizarre" interpretation of its policy against requiring familial disclosures in order to turn aside the witness's objections.

In this appeal, the government contends that the district court legally erred in quashing the subpoena and, further, that its findings of fact with regard to misconduct and bad faith on the part of the government were clearly

³ The policy interpretation mentioned in n.2 was that of the Antitrust Division, and it was apparently at odds with one of the Criminal Division, which drew no distinction between familial relationships and business relationships as the source of knowledge of incriminating evidence but which took the position that cousins are not close family relatives. To avoid inconsistency within the department, the government sought immunity for appellee and his brother, but not for his cousin.

erroneous. Because we agree with the government's first contention, we do not reach the other.

II.

Even if we assume that the government sought the subpoena for an improper purpose,⁴ the finding that it was also sought for a legitimate purpose is not clearly erroneous. The record fully supports the factual findings that there was reason to believe that there had been bid rigging, that the corporation and its principals were implicated and that the witness had relevant evidence to give to the grand jury. This, we think, is reason enough not to quash the subpoena.

The principles that the powers of the grand jury may be used only to further its investigation, and that a court may quash a subpoena used for some other purpose, are both well recognized. The former rests on the simple, but fundamental, concept that the grand jury serves an independent investigatory function and is "not meant to be the private tool of the prosecutor." *United States v. Fisher*, 455 F.2d 1101, 1105 (2 Cir. 1972). Thus, practices which do not aid the grand jury in its quest for information bearing on the decision to indict are forbidden. This includes use of the grand jury by the prosecu-

⁴ We call attention to the fact that we have recently held that no privilege protects a witness from being compelled to give a grand jury evidence against his family. *United States v. Jones*, 683 F.2d 817 (4 Cir. 1982) (son may be compelled to testify against father before grand jury). *Accord In re Grand Jury Proceedings*, 647 F.2d 511 (5 Cir. 1981) (daughter may be compelled to testify against mother and stepfather). Nor may a witness assert a legal right grounded upon the policies stated in the United States' Attorney Manual. "The guidelines . . . are directed to the handling of requests by United States Attorneys within the Department of Justice for permission to seek orders granting immunity. They are not directed to the procedural or substantive rights of prospective witnesses." *In re Tierney*, 465 F.2d 806, 813 (5 Cir. 1972).

tor to harass witnesses⁵ or as a means of civil⁶ or criminal⁷ discovery. In a proper case, this prohibition should as well include the use of a grand jury subpoena to coerce a plea bargain when that use has no relation to a proper purpose of the grand jury. The power to quash a subpoena exists in the district court of the district where the grand jury sits by reason of its inherent authority to prevent misuse of its own process.⁸

What governs the decision of this case is the polestar that a court should not intervene in the grand jury process absent a compelling reason. *United States v. Dionisio*, 410 U.S. 1, 16-18 (1973).⁹ There is insufficient reason to

⁵ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972); *In re Poutre*, 602 F.2d 1004 (1 Cir. 1979); *Ealy v. Littlejohn*, 569 F.2d 219 (5 Cir. 1979).

⁶ *United States v. Proctor & Gamble*, 356 U.S. 677, 683 (1958); *In re Grand Jury Subpoenas*, April 1978, 581 F.2d 1103, 1108 (4 Cir. 1978).

⁷ *In re Grand Jury Proceedings*, 632 F.2d 1033 (3 Cir. 1980).

⁸ The subpoena, of course, is an order by the district court to a witness to appear before the grand jury. See *United States v. Dionisio*, 410 U.S. 1, 12 (1973) ("Grand juries are subject to judicial control and subpoenas to motions to quash."); *Rea v. United States*, 350 U.S. 214, 217 (1956) (commenting upon a court's "inherent authority to consider and decide questions arising before it concerning an alleged unreasonable exertion of authority in connection with the execution of the process of the court.") The authority to quash an "unreasonable or oppressive" subpoena duces tecum is expressly provided by the Federal Rules of Criminal and Civil Procedure. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b).

⁹ Justice White explained the importance of the grand jury's power to subpoena freely witnesses in *Branzburg supra*, Hayes, 408 U.S. at 688 (1972). He stated:

Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by

justify the grant of a motion to quash where, as here, the sought-after testimony is of demonstrated relevancy to the grand jury's investigation.

Central to our decision is the district court's finding that it was likely that the petitioner "had relevant and material evidence to present to the Grand Jury." Once it is shown that a subpoena might aid the grand jury in its investigation, it is generally recognized that the subpoena should issue even though there is also a possibility that the prosecutor will use it for some purpose other than obtaining evidence for the grand jury.¹⁰ For example, we have held that an adequate showing is made to justify the issuance of a subpoena if the United States Attorney avers that it is sought in good faith to aid the grand jury's investigation even though circumstances

questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282, 63 L.Ed. 979, 983, 39 S. Ct. 468 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, *id.*, at 279-281, 63 L.Ed. at 981-983, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public . . . has a right to every man's evidence," except for those persons protected by a constitutional common-law, or statutory privilege is particularly applicable to grand jury proceedings. (citations omitted)

¹⁰ In the rare cases where a witness has been granted relief from the grand jury's process it is usually predicated upon a finding that nothing of relevance will be obtained by enforcing the process. *See Ealy v. Littlejohn*, 569 F.2d 219 (5 Cir. 1978) (First Amendment protects political association from inquiry by the grand jury into its financing and membership when that bears no relation to the subject matter of the investigation); *Bursey v. United States*, 466 F.2d 1059, 1079-81 (9 Cir. 1972) (protecting witness from abusive, repetitious questioning found to serve no useful purpose); *Brown v. United States*, 245 F.2d 549, 555 (8 Cir. 1957) (perjury conviction may not be grounded upon false statements made on matters immaterial to the grand jury's investigation).

suggest that it might also be used as a means for civil discovery. *In re Grand Jury Subpoenas*, April 1978, 581 F.2d 1103 (4 Cir. 1978). Similarly, it has been held that a subpoena, issued after an indictment was returned and allegedly sought by the prosecutor to obtain evidence for a criminal trial, should be quashed only if that is shown to be the "sole or dominant purpose of seeking the evidence." Conversely, "a good faith inquiry into other charges within the scope of the grand jury's lawful authority is not prohibited even if it uncovers further evidence against an indicted person." *In re Grand Jury Proceedings*, 632 F.2d 1033, 1040-41 (3 Cir. 1980), and cases cited therein.

Moreover, the importance of an alternative remedy has been recognized in several decisions refusing to quash a subpoena despite allegations that it was being used by the prosecutor to collect evidence for a civil proceeding on the ground that disclosure could be prevented under Rule 6(e) or cured by suppression of the evidence in later civil proceedings. *In re Grand Jury Subpoenas*, April 1978, *supra*; *In re Special March 1974 Grand Jury*, 541 F.2d 166, 170-71 (7 Cir. 1976); *In re Grand Jury Subpoena Duces Tecum*, 520 F. Supp. 253 (S.D. Tex. 1981).

Here the alleged abuse of the grand jury process is an apparent effort by the United States Attorney to coerce a plea bargain from a relative of the witness by threatening the witness with imprisonment for contempt if he refuses to testify against his relatives, something he has expressed great reluctance to do. If the resulting plea is truly coerced, it cannot properly be accepted under Rule 11(d) of the Federal Rules of Criminal Procedure. Indeed, at the Rule 11 proceeding, it would be incumbent upon the district court to ascertain the nature of the plea discussions held between the defendant, his counsel and the United States Attorney. Fed. R. Crim. P. 11 advisory committee note, 1974 amendment. If the district

court determined that improper persuasion had been used by the prosecutor to compel the plea, the district court could not accept it, or if the issue was raised later, collateral relief under 28 U.S.C. § 2255 would be available. *See United States v. Nuckols*, 606 F.2d 566 (5 Cir. 1979). Thus remedies exist for the abuse alleged here if it is in fact real. The existence of such remedies reinforces our view that the district court's grant of the motion to quash the subpoena was legal error.

Since we find erroneous the only basis assigned by the district court for quashing the subpoena,¹¹ we reverse its order.

REVERSED.

¹¹ Before the district court the petitioner also argued that the subpoena should be quashed because the grant of immunity was not coextensive with his Fifth Amendment privilege against self-incrimination. The issue was never addressed by the district court and the petitioner does not press it here as an alternative ground in support of that court's order even though the United States raised the issue in its brief. He has thus abandoned the argument and therefore we will not address it. *See Carolinas Farm & Power Equipment Dealers v. United States*, 699 F.2d 167, 169 n.2 (4 Cir. 1983).